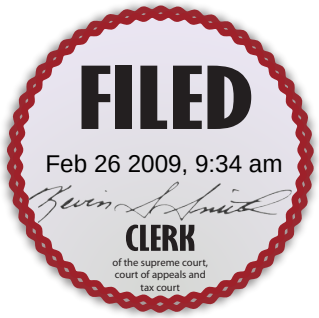

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IN THE
COURT OF APPEALS OF INDIANA

DARRELL MCNARY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0806-CR-296
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0606-FB-31

February 26, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Darrell McNary (McNary), appeals his conviction and sentence for dealing cocaine, as a Class B felony, Ind. Code § 35-48-4-1.

We affirm.

ISSUES

McNary presents three issues for our review:

(1) Whether the trial court abused its discretion by denying McNary's motion for a continuance that was filed three days before his trial was to begin;

(2) Whether the trial court abused its discretion by admitting into evidence an audio recording of the drug transaction; and

(3) Whether McNary's sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY[1]

The following is the evidence most favorable to the jury's verdict. On January 10, 2006, McNary sold 1.342 grams of crack cocaine to Justin Simpson (Simpson), a cooperating source for the Elkhart County Interdiction and Covert Enforcement Unit. The controlled buy occurred near the 88-mile marker on the U.S. 20 bypass in Elkhart County, in the presence of undercover Goshen Police Detective Jose Miller (Detective Miller). The drug transaction

[1] We remind McNary's counsel that the table of contents for an appellate appendix is to list the date for each item included. Ind. Appellate Rule 50(C).

was recorded by a digital recording device in the cigarette lighter of Simpson's car. That recording was eventually transferred onto a CD.

On June 23, 2006, the State filed an Information charging McNary with dealing cocaine, as a Class B felony, I.C. § 35-48-4-1. At the initial hearing held on July 13, 2006, a public defender was appointed to represent McNary. On September 28, 2006, the trial court, after warning McNary of the dangers of representing himself, reluctantly granted McNary's request to proceed *pro se* and appointed a public defender to serve as standby counsel. On October 5, 2006, the trial court tentatively set a trial date of April 30, 2007. At a hearing on January 25, 2007, the trial court urged McNary to allow the public defender to assist him in his defense, but McNary declined. The trial court confirmed the trial date of April 30, 2007.

On April 12, 2007, McNary asked that the trial be rescheduled "as a result of appeal or mandamus action he's pursuing." (Appellant's App. p. 8). The trial court granted McNary's request and reset the trial for September 10, 2007. At a hearing on April 26, 2007, the trial court again warned McNary of the dangers of proceeding *pro se*, but McNary affirmed his desire to represent himself.

On May 24, 2007, McNary filed a Motion to Obtain Funds For Expert and Investigative Assistance requesting, among other things, an "audio production analyst" to help him show that the audio recording of the alleged drug transaction had been manipulated. (Appellant's App. p. 182). The trial court directed McNary "to provide the Court with an estimate of the cost and identification of who his alleged expert would be with respect to such issues." (Appellant's App. p. 193). On August 22, 2007, McNary provided the trial

court with Defendant's Information of Names and Cost of Expert Witnesses.[2] McNary claimed that "[t]he cost for audiotape authentication will be $3,500, and court testimony will be $3,500 per day, plus travel from New York." (Trial Transcript p. 302). However, McNary never identified who his expert would be, and the trial court never explicitly ruled on this motion.

On August 29, 2007, McNary filed a motion seeking a continuance of the September 10, 2007, trial date. The trial court granted McNary's motion and reset the trial for April 21, 2008. At a hearing on October 18, 2007, McNary indicated to the trial court that he intended to employ private counsel. The trial court reduced McNary's bond, and he was released on bond shortly thereafter.

During a hearing held on April 3, 2008, McNary told the trial court that he would not be ready for the April 21st trial and requested another continuance. The trial court denied McNary's request. At a hearing on April 14, 2008, McNary told the trial court that he had hired an attorney and would be represented at trial. However, on April 18, 2008, McNary filed another motion for a continuance. McNary stated that he had contacted several attorneys but that none of them would represent him unless he could get a continuance.

A jury trial was held on April 21-22, 2008. On the morning of April 21, the trial court held a hearing on McNary's motion for a continuance. The trial court denied McNary's motion, noting how long the case had been pending and how long McNary had to obtain a

[2] This document was not file stamped, and we cannot find it in the record on appeal. During trial, the document was located in the case file, and the judge read the contents on the record.

private attorney. McNary then asked that his standby counsel from the public defender's office represent him at trial, and the trial court so ordered. Over McNary's objection, the trial court admitted into evidence the audio recording of the alleged drug transaction. Both Simpson and Detective Miller testified that the audio recording was an accurate representation of the drug transaction. The jury found McNary guilty as charged. On May 15, 2008, the trial court sentenced McNary to fifteen years, with thirteen years executed and two years suspended to reporting probation.

McNary now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Motion for Continuance*

McNary first argues that the trial court abused its discretion by denying his final motion for a continuance. McNary does not contend that his motion satisfied the statutory requirements for obtaining a defense continuance. *See* I.C. § 35-36-7-1. Rulings on non-statutory motions for continuance lie within the discretion of the trial court and will be reversed only for an abuse of that discretion. *Jackson v. State*, 758 N.E.2d 1030, 1033 (Ind. Ct. App. 2001). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id*.

A. *Expert Witness*

McNary first contends that the trial court should have granted him a continuance because he needed time to hire an expert to analyze the audio recording of the drug transaction, which he claimed had been altered (more on that later). McNary acknowledges

that continuances for additional time to prepare for trial are generally disfavored. *See Jackson*, 758 N.E.2d at 1033. However, he suggests that the reason he needed more time was that the trial court never granted his request for funds to hire such an expert, which he originally made on May 24, 2007. But, as noted in the Statement of Facts, McNary never complied with the trial court's order to provide the name of his proposed expert. Having failed to provide the information requested by the trial court, McNary cannot now be heard to complain that the trial court erred by refusing to provide him with funds to hire an expert. Thus, McNary's related argument that the trial court abused its discretion by denying his motion for a continuance must fail.

B. *Absent Witness*

Next, McNary argues that the trial court should have granted him a continuance so that he could compel the attendance of Roxanne Peck (Peck) as a witness. Peck was Simpson's girlfriend, and she was in the car with Simpson and Detective Miller at the time of the drug transaction. In his motion to the trial court, McNary alleged that he had been told that Peck "could not be served or required to attend a deposition because she was located in Noble County." (Appellant's App. p. 300). McNary urged the trial court to grant him a continuance to compel Peck's attendance because he believed that "she would testify that [he] was not involved in the drug transaction alleged." (Appellant's App. p. 300). However, McNary offered no explanation or basis for his supposed belief that Peck, the third occupant in the car, would testify in his favor, when the other two occupants of the car testified against

him. As such, we cannot say that the trial court abused its discretion by denying McNary's motion for a continuance on this ground.

C. *Hiring Private Counsel*

In addition, McNary asserts that the trial court should have granted him a continuance so that he could hire a private attorney. At the time of his request, this case had been pending for nearly twenty-two months. McNary had already obtained two continuances, one for four months and another for seven months. For the first sixteen months, despite repeated warnings from the trial court, McNary insisted that he be allowed to represent himself. Then, on October 18, 2007, McNary finally told the trial court that he wanted to hire a private attorney. But, on April 3, 2008, McNary made an oral request for another continuance, in part because he was still working on hiring an attorney. However, on April 14, 2008, McNary told the trial court that he had a private attorney and would be ready for trial. Then, on April 18, 2008, a Friday, three days before the trial was supposed to start on April 21, 2008, a Monday, McNary asked for more time to hire a private attorney. Given the age of the case and the continuances McNary had already received, the trial court acted well within its discretion in denying his final request.

Moreover, even if we were to hold that the trial court should have granted McNary a continuance on this ground, reversal is not appropriate unless the defendant can show that he was prejudiced by the abuse of discretion. *See Jackson*, 758 N.E.2d at 1033. Here, the public defender who had been serving as McNary's standby counsel stepped in and represented McNary at trial. While McNary maintains that he and the public defender "could

not see eye to eye," he makes no allegation whatsoever that the public defender performed inadequately at trial. (Appellant's Reply Br. p. 6). Having failed to establish prejudice on this ground, McNary would not be entitled to reversal even if we held that the trial court should have granted a continuance.

II. *Admission of the Audio Recording*

McNary also argues that the trial court should not have admitted the audio recording of the drug transaction into evidence. A trial court has broad discretion in ruling on the admissibility of evidence. *Fentress v. State*, 863 N.E.2d 420, 422-23 (Ind. Ct. App. 2007). Accordingly, we will reverse a trial court's ruling on the admissibility of evidence only when the trial court abuses its discretion. *Id*. at 423. Again, an abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id*. "The foundational requirements for the admission of a tape recording made in a non-custodial setting are: (1) that the recording is authentic and correct; (2) that it does not contain evidence otherwise inadmissible; and (3) that it be of such clarity as to be intelligible and enlightening to the jury." *Kidd v. State*, 738 N.E.2d 1039, 1042 (Ind. 2000), *reh'g denied*. The trial court has wide discretion in determining whether these criteria have been met. *Id*.

McNary acknowledges that he was at the scene of the drug transaction, but he denies any participation in the transaction. He claims that he was merely giving his friend a ride. Regarding the audio recording, McNary's argument is that, in the process of transferring the original digital recording to a CD, the recording was broken into five segments, that the CD

that was played for the jury only included four of those five segments and left the jury with the impression that Simpson and Detective Miller conducted a drug transaction with a man, and that the fifth segment, if it had been played to the jury, would have revealed that it was actually a woman—McNary's friend Wanda—who conducted the drug transaction. In short, McNary contends that the jury did not hear an authentic and correct recording of the transaction in question.[3]

In *Lawson v. State*, 619 N.E.2d 964 (Ind. Ct. App. 1993), a confidential informant organized a drug transaction with the defendant while wearing a body transmitter, allowing two police officers to monitor the conversation. The defendant was charged with conspiracy to distribute cocaine. At trial, the confidential informant and the police officers testified that the tape recording was accurate and correct. Over the defendant's objection, the recording of the conversation was played for the jury, and the defendant was convicted. On appeal, we held that the testimony by the confidential informant and the two police officers was sufficient to authenticate the audio recording. *Id*. at 965-66.

Likewise, here, both Simpson and Detective Miller participated in the recorded transaction. At trial, both testified that the recording accurately reflected the drug transaction. As in *Lawson*, such testimony was sufficient to authenticate the recording.

[3] McNary also suggests that the recording was not of sufficient clarity to assist the jury, *i.e.*, that it is of poor sound quality. However, he did not raise that specific argument to the trial court, he does not develop it as a separate argument on appeal, and our review of the recording did not reveal poor sound quality. As such, we will treat this allegation as part of McNary's argument that the recording is not authentic and correct.

Therefore, the trial court did not abuse its wide discretion by admitting the recording into evidence.

III. *Sentence*

Finally, McNary argues that his sentence is inappropriate. Indiana Appellate Rule 7(B) permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B); *see also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080. McNary has not carried this burden.[4]

McNary was convicted of dealing cocaine as a Class B felony. The minimum sentence for a Class B felony is six years, the advisory sentence is ten years, and the maximum sentence is twenty years. The trial court sentenced McNary to fifteen years with two years suspended to reporting probation. McNary contends that anything in excess of the advisory sentence of ten years is inappropriate. We disagree.

[4] Though the State prevails on this issue, we pause to address some flaws in its sentencing argument. In its standard of review, the State cites "*Gibson v. State*, 864 N.E.2d 452, 457 (Ind. Ct. App. 2007)." We first note that it is *Luhrsen v. State*, not *Gibson v. State*, that appears at 864 N.E.2d 452. *Luhrsen* cites *Gibson*, which appears at 856 N.E.2d 142 (Ind. Ct. App. 2006). More importantly, the State cites *Gibson*/*Luhrsen* for the proposition that "an appellate court should not conduct a *purely de novo* review of sentences but must begin its analysis with an examination of the sentencing statement issued by the trial court." (Appellee's Br. p. 12). That proposition is certainly supported by *Gibson* and *Luhrsen*, but it was essentially superseded by our supreme court's opinion in *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007), which definitively outlined the parameters of appellate review of sentences in Indiana under the current advisory scheme.

We acknowledge that McNary's offense was, by all indications, a fairly run-of-the-mill drug transaction. A relatively small amount of cocaine was involved, and the transaction did not occur around any children. However, in light of McNary's criminal history, we cannot say that his sentence is inappropriate. In 1982, McNary was convicted of attempted robbery resulting in serious bodily injury, a Class A felony, and sentenced to thirty-five years in prison. McNary spent approximately twenty years in prison, from 1982 to 2002. As the trial court noted, even that lengthy period of incarceration failed to rehabilitate McNary. In his brief, McNary focuses on the steps he has taken since his release to lead a productive, law-abiding life. We applaud McNary for those efforts, but this conviction demonstrates that McNary is not yet able to conform his behavior to the laws of this State. McNary's sentence is not inappropriate.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion by denying McNary's final motion for a continuance or by admitting the audio recording of the drug transaction into evidence. In addition, we conclude that McNary's sentence is not inappropriate.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.